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No. 98-601

In The

Supreme Court of the United States

October Term, 1998

HONORABLE BRUCE W. DODDS,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANY, INC., a Delaware Corporation,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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Petitioner, the Honorable Bruce William Dodds, respectfully submits this brief in reply to Respondent American Broadcasting Companies, Inc.'s ("ABC's") brief in opposition to the Petitioner's petition for a writ of certiorari herein.

INTRODUCTION

Petitioner seeks review of the question whether the intent to convey a defamatory implication in a television news broadcast must be demonstrated under the subjective standard as applied by the Ninth Circuit, where the defamatory implication is inescapable and the result of conscious choices made by a defendant. ABC argues two new points[1] in its opposition brief: (1) that there is no reason to adopt the objective test in defamation-by-implication cases (Respondent's Brief at 11-17); and, (2) that Petitioner waived the issue in the lower court (Respondent's Brief at 20-22). As set forth below, ABC is wrong on both points.

THERE ARE VALID REASONS TO DETERMINE THE INTENT TO DEFAME UNDER AN OBJECTIVE TEST IN DEFAMATION BY IMPLICATION CASES INVOLVING PUBLIC FIGURES AND TELEVISION

The first reason to adopt the objective standard is that it is the rational approach to the growing problem of television media overreaching: it would punish, rather than reward, publishers who consciously communicate a statement "in a surreptitious and invidious manner by implication," as opposed to stating directly what they intend. *See Cochran v. Indianapolis Newspapers, Inc.*, 175 Ind. App. 548, 563, 372 N.E. 2d 1211, 1222 (Ind. App. 1978).

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1. ABC also argued that there was no conflict between the Circuits on this issue. (Respondent's Brief at 17-20.) Petitioner believes that ABC's analysis, including its attempt to distinguish *Woods v. Evansville Press Co., Inc.*, 791 F.2d 480, 488 (7th Cir. 1986), is flawed. However, Petitioner argued that there was a conflict between the Circuits in his opening brief, and, pursuant to Rule 15.6, will not readdress that issue herein.

An objective test is the reasoned approach because television defamation by implication is, at the same time, far more powerful than express defamation, and far more likely to be the result of conscious publication choices. It is more powerful because it assaults the viewer with a three-part punch of image, word, and sound, involving more of the senses than any other media. It is also a fluid, rather than static, media; the images move, the speaking tone changes, the background noise/music alters, etc. Thus, implied statements, or subliminal or indirect comments, are heightened in impact.

The defamation is most likely conscious because the media requires the selective joining of all of the sensory components of the publication, *i.e.*, visual, text, and sound. These elements are mixed and re-mixed by professionals whose aim is to make the most of each second. It is therefore virtually inconceivable that an implication is published which was not intended.

There is no reason to provide constitutional protection to undisciplined "journalism" which is not concerned about accurate reporting on matters of public interest. To the contrary, there is every reason to hold alleged journalists responsible for their conscious choices to garner audience share through titillating hints and innuendo. And an objective test, which asks whether the defamatory implication was inescapably present, would do just that without chilling the First Amendment.

Second, an objective test is not a great departure from prior precedent. Indeed, in *St. Amant v. Thompson*, 390 U.S. 727 (1968), this Court warned that the actual malice test could not be employed as subterfuge, warning that "the defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." *Id.* at 732. Rather:

> The *finder of fact* must determine whether the publication was indeed made in good faith.

> Professions of good faith will be unlikely to prove persuasive . . . when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Id. at 731-32 (emphasis added), citing *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 169-70 (1967).

The "inherently improbable" standard is objective, not subjective, in nature. Yet it supports a finding of subjective intent on malice. Here, Petitioner contends that a similar test, objective in nature, should support a finding of subjective intent to defame. That is, if the defamatory implication is so clear as to be undeniable, then the jury should determine the defendant's intent to defame.

THE ISSUE FOR WHICH CERTIORARI IS REQUESTED WAS PRESSED AND RULED UPON IN THE LOWER COURTS AND IS PROPERLY BEFORE THIS COURT

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (explaining that the rule is not inflexible, and taking review to a certain extent due to circumstances). The rule applies to issues not "pressed or passed upon below." *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Applying the above rule, however, the instant issue is properly before this Court. As even ABC acknowledges, the issue was presented to the Ninth Circuit and determined on the merits. (Respondent's Brief at 21.) Thus, this is not a case where the issue was not presented to the Court of Appeals [*see, e.g., Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958) (issue was not presented to

Court of Appeals or raised in petition for certiorari)], or where the Court of Appeals determined that the issue had been waived on appeal. *See, e.g., State of Cal. v. Taylor*, 353 U.S. 553, 556 n.2 (1957). To the contrary, the instant issue was squarely before the appellate court.

ABC is also in error when it contends that Petitioner waived the issue in the trial court. It is true that Petitioner responded, "undisputed," to a series of quotations through which ABC purported to articulate the intent standard. However, it is also apparent that the trial court understood that the issue was presented, and considered it on the merits. The trial court explained the objective/subjective arguments made in *Newton v. National Broadcasting, Co., Inc.*, 930 F.2d 662 (9th Cir. 1990), explained the rationale of the *Newton* trial court's opinion, and then expressly noted:

> The [Ninth Circuit] rejected in unequivocal terms the argument relied upon by the [*Newton*] district court and ***urged by plaintiff in this case***: . . . .

(Pet. App. 42a, emphasis added.)

The instant trial court's statement, set forth above, plainly reveals that the trial court considered the instant issue.

CONCLUSION

There are valid reasons to consider adopting the rule proposed by Petitioner for cases involving implied defamation in television broadcasts. In this case, that issue was pressed by the Petitioner below, and passed upon by both the trial court and the Court of Appeals. As a result, there is no bar to review, and the writ of certiorari should issue.

Respectfully submitted,

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